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**MARRIED WOMAN—PERSONAL INJURIES—DAMAGES—
CAPACITY FOR LABOR.**

HARMON V. OLD COLONY R. R. CO.*

Supreme Judicial Court of Massachusetts, January 1, 1896.

In action by married woman for personal injuries the impairment of her capacity for labor may be considered as an element of the damage recoverable by her in her own right.

ALLEN, J.: The general question arising in this case is whether, in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of the damages. By St. 1846, ch. 209, § 1, it was enacted that "in all cases where married women shall hereafter by their own labor earn wages, payment may be made to them for the same." This was followed by St. 1855, ch. 304, § 7: "Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services and earnings; and her property acquired by her trade, business and service and the proceeds thereof may be taken on any execution against her." By St. 1857, ch. 249, § 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property or to her trade. The rights of married women in respect to their labor are thus defined in Gen. St., ch. 108, sec. 1: "The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor or services carried on or performed on her sole and separate account . . . shall, notwithstanding her marriage, be and remain her sole and separate property and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts." Section 3: "A married woman may bargain, sell and

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convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business and perform any labor or services on her sole and separate account and sue and be sued in all matters having relation to her separate property, business, trade, services, labor and earnings in the same manner as if she were sole." Section 5: "The contracts made by a married woman in respect to her separate property, trade, business, labor or services shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole." Section 6: "Payment may be made to a married woman for wages earned by her labor," etc. By St. 1862, ch. 198, amended by St. 1881, ch. 64, § 1, a married woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars, or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts. By St. 1874, ch. 184, § 1, "a married woman may . . . make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an express agreement on her part to the contrary, be presumed to be on her separate account." And by section 3 "a married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife." This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied in a somewhat compressed form in Pub. St., ch. 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits they are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings

nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship, and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which, perhaps, may require her absence for ten years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent—as, for example, in fixing the domicile, and in being responsible, under ordinary circumstances, for its orderly management—the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case. The radical nature of the change effected by the legislation of this State in the legal condition of married women is illustrated in numerous decisions, of which *Jordan v. Railroad Co.*, 138 Mass. 425, most nearly resembles the present case. But see, also, *Parker v. Simonds*, 1 Allen, 258;

Ames v. Foster, 3 Allen, 541; *Plumer v. Lord*, 5 Allen, 460; *Chapman v. Foster*, 6 Allen, 136; *Stewart v. Jenkins*, Id. 300; *Chapman v. Briggs*, 11 Allen, 546; *Burke v. Cole*, 97 Mass. 113; *Snow v. Sheldon*, 126 Mass. 332; *Read v. Stewart*, 129 Mass. 407; *Bank v. Windram*, 133 Mass. 175; *Butler v. Ives*, 139 Mass. 202, 29 N. E. Rep. 654; *Binney v. Bank*, 150 Mass. 574, 23 N. E. Rep. 380. Exceptions sustained.

NOTE.—The principal case is a very important one. There are few authorities upon the question which it decides, although many of the States now have statutes permitting married women to sue in cases in which they could not have sued alone at common law. Except where otherwise provided by statute the general rule is that two actions may be instituted for a tort or wrongful injury to a married woman; one by the husband alone for the loss of service, society, and expenses in nursing and taking care of her, and one by the husband and wife for the injury to the wife's person. *Smith v. City of St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660; *McKinney v. Western Stage Co.*, 4 Iowa, 420; *Newhirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; *Barnes v. Hurd*, 11 Mass. 59; *Heim v. McCaughan*, 32 Miss. 17; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; 2 Saund. Pl. & Ev. 568. In the first case the damages would be recovered by the husband alone and would not include anything for the mere injury to the wife's person, while in the latter case the damages would accrue to the wife and not to the husband, and would not include loss of services, injury to her earning capacity or the like. *Ohio & Miss. R. Co. v. Corby*, 107 Ind. 32; *Baltimore R. R. Co. v. Kemp*, 61 Md. 74; *Whitney v. Hitchcock*, 4 Denio (N. Y.), 461; *Bartley v. Richtmyer*, 4 N. Y. 38; *Creign v. Brooklyn etc. R. Co.*, 75 N. Y. 192; *Cowden v. Wright*, 24 Wend. (N. Y.) 429; *King v. Thompson*, 87 Pa. St. 365; *Klein v. Jewett*, 26 N. J. Eq. 474; *Klingman v. Holmes*, 54 Mo. 304; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Belyea v. Minneapolis R. R. Co.* (Minn.), 63 N. W. Rep. 627; Schouler on Husband and Wife, 141, and authorities above cited. But some of the modern statutes and "married woman acts" have changed this rule. How far they have done so in particular instances is not yet well settled. Under some of the statutes the husband, in an action by himself and wife for injury to the latter may also join thereto a claim in his own right and recover for the loss of her services occasioned by the injury. *McDonald v. Chicago etc. R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114. Under others, as shown in the principal case, the wife may sue alone in a proper case and recover damages which would formerly have gone to her husband. The object of the "married woman acts" is stated and their general nature and effect explained and considered in a leading article in 38 Cent. L. J. 287. They usually provide, among other things, that married women may sue alone in certain cases; that they may make contracts and carry on business or labor for themselves, and that their earnings shall be their own sole and separate property. If such a statute gives a married woman a right to her own services, and makes her earnings her separate property, it would seem clear, as held in the principal case, that loss of earning capacity is a proper element of damages in an action by herself. It was so held in Massachusetts in *Jordan v. Middlesex R. Co.*, 138 Mass. 425. So, in Missouri, in *Smith v. Chicago etc. R. Co.*, 23 S. W. Rep. 784, it was held that loss

of earnings is a proper element of damages in a suit by herself. In Wisconsin, in the case of *Fife v. City of Oshkosh*, 89 Wis. 540, 62 N. W. Rep. 541, it was held that a married woman was entitled to recover for the loss of time occasioned by a personal injury to her. So, in Texas, in *Gulf etc. R. Co. v. Greenlee*, 62 Tex. 344, and in Georgia, in *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647, 15 S. E. Rep. 825, and *Metropolitan St. Ry. Co. v. Johnson*, 16 S. E. Rep. 49. In New York it has been held under such a statute that the services of the wife in the household still belong to her husband, and that he, and not she, is entitled to recover therefor, but that when she works for another her services and earnings belong to herself, and she can recover for the loss of the same while disabled by a personal injury. *Brooks v. Schueren*, 54 N. Y. 343; see *Blaechinska v. Howard Mission*, 130 N. Y. 497, and cases there cited. So it is held in Iowa that a married woman cannot recover damages for being rendered less capable of performing her duties as a housewife. *Hall v. Incorporated Town of Manson* (Ia.), 58 N. W. Rep. 881. See also *Walter v. Kensinger*, 2 Pa. Dist. R. 728. And in Indiana, in *Citizens' St. R. Co. v. Twiname*, 121 Ind. 375, although the statute permitted married women to carry on business for themselves and provided that their earnings, other than those accruing from labor for their husbands or families, should be their separate property, it was held that the husband, and not the wife, was entitled to recover damages for loss of services of the wife in aiding him to carry on the millinery business, as she had done before her injury without any contract or expectation of compensation therefor. In another Indiana case it was said that "it is the duty of the husband to support and maintain his wife, and to furnish medical treatment and care in case of injury or ailment; and, presumptively, all such damages accrue to him, but this is but a naked presumption, and when it is averred and proved that the wife has expended money or incurred a liability on her own account, she is entitled to recover therefor as if she were sole." *Board v. Castetter*, 7 Ind. App. 309, 34 N. E. Rep. 687. See also *Ohio & Miss. R. Co. v. Corby*, 107 Ind. 32. Under the Arkansas statute, which is similar to that in Indiana, the United States Court of Appeals also held that a husband still had a valuable right in his wife's services, and that he could recover for the loss of the same by reason of her death caused by the negligence of another. *St. Louis etc. R. Co. v. Henson*, 58 Fed. Rep. 531.

There are many cases holding that damages recovered by a married woman in an action for personal injuries become her separate property, or part of her separate estate, but few, if any, of them discuss the question decided in the principal case. It will be seen from the cases which have been briefly reviewed herein that there is much apparent and some real conflict among the few authorities upon the subject. It seems to the writer that the better rule is that announced in the principal case. It may be, however, that a "northwest passage" will be found by following the course mapped out by the New York Court of Appeals, or perhaps the view may be taken that the wife can recover for such services, or rather for impairment of her capacity to perform such services as an ordinary servant might perform, while for the loss of such services as only a wife could perform the husband is the one entitled to recover. This, however, is a very shadowy distinction, and the difficulty in applying it would be a serious objection to any such rule.

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